United States Court of Appeals

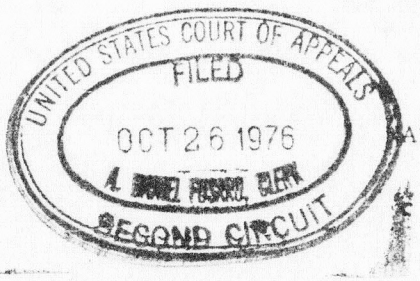
for the Second Circuit

BRIEF FOR APPELLEE

76-6094

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT



NATIONAL LABOR RELATIONS BOARD,
Applicant-Appellee,

v.

BIOPHYSICS SYSTEMS, INC.,
Respondent-Appellant,

and

BIOPHYSICS SYSTEMS, INC.,
Respondent-Appellant,

v.

JOHN S. IRVING, GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD, AND WINIFRED D. MORIO, REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, REGION 2,
Additional Defendants on the Counterclaims-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES NATIONAL LABOR RELATIONS BOARD, *ET AL.*

JANET C. McCAA, *Deputy Assistant General Counsel for Special Litigation,*

ERIC GRAY MOSKOWITZ,
Attorney,

National Labor Relations Board,
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

I N D E X

AUTHORITIES CITED

Cases: Page

I N D E X

Cases-Cont'd: Page

I N D E X

Cases-Cont'd: Page

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UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD,

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v.

BIOPHYSICS SYSTEMS, INC.,

Respondent - Appellant,

and

BIOPHYSICS SYSTEMS, INC.,

Respondent - Appellant,

v.

JOHN S. IRVING, General Counsel
of the National Labor Relations
Board, and WINIFRED D. MORIO,
Regional Director of the
National Labor Relations Board,
Region 2,

Additional Defendants on
the Counterclaims - Appellees.

On Appeal From an Order of the
United States District Court for
the Southern District of New York

BRIEF FOR APPELLEES NATIONAL LABOR RELATIONS BOARD, et al.

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the District Court properly held that certain documents prepared or assembled by Board agents in anticipation of unfair labor practice litigation are exempt from disclosure under the Freedom of Information Act.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on appeal by Biophysics Systems, Inc. ("Biophysics") from an order of the District Court for the Southern District of New York concluding that the Freedom of Information Act (herein "the FOIA"), 5 U.S.C. Sec. 552, as amended, 88 Stat. 1561, does not entitle Biophysics to disclosure of employee affidavits, Union authorization cards, and certain memoranda and other documentary material assembled by the National Labor Relations Board (herein "Board") agents in anticipation of unfair labor practice litigation. The District Court's opinion and order were issued by Judge Ward on April 12, 1976, and are reported at 91 LRRM 3079. Since the District Court's order is a final judgment, this Court has jurisdiction under 28 U.S.C. §1291.

I. BACKGROUND

On December 18, 1974, Local 1783, International Brotherhood of Electrical Workers, AFL-CIO (herein "the Union") filed unfair labor practice charges with the Board's Second Regional Office alleging that Biophysics Systems, Inc. (herein "Biophysics") was engaged in

a course of conduct designed to dissipate the majority status of the Union (A. 15a).[1/] A Board attorney was assigned to investigate the Union's charge. During the course of her investigation, the Board attorney obtained several affidavits from individuals (A. 114a-116a). A number of union authorization cards signed by Biophysics' employees had earlier been submitted to the Board during the processing of a representation petition seeking an election among Biophysics' employees. (Board Case No. 2-RC-16670 (A. 166a)). The cards are still in the possession of Region Two and may be used in the course of the unfair labor practice litigation described below to establish majority status of the Union in the event the General Counsel seeks a remedial bargaining order.

On March 25, 1975, the Board's Regional Director issued a complaint in Board Case No. 2-CA-13562 alleging that Biophysics had violated Section 8(a)(1) of the National Labor Relations Act (herein "the NLRA")[2/] by interrogating, threatening and warning its employees regarding their Union membership, and by promising wage increases to induce

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1/ "A." references are to the printed appendix.

2/ Section 8(a)(1), 29 U.S.C. Section 158(a)(1), provides:

> (a) It shall be an unfair labor practice for an employer --
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7;

defection from the Union (A. 16a-20a). On June 16, 1975, Biophysics requested that the Board's Regional Director supply Biophysics with the following: the affidavits of all individuals whom counsel for the General Counsel intended to call as witnesses at the unfair labor practice hearing; all Union authorization cards signed by Biophysics' employees; and all notes, memoranda, correspondence, papers, reports, inter-office communications, minutes of meetings and all other records and documentary material obtained by the General Counsel during the investigation of the case which were inconsistent or in conflict with the charges in the complaint (A. 57a-58a). Since Biophysics' request cited the FOIA for support, Biophysics' request was treated as having been made under that Act. On June 20, 1975, the Regional Director denied Biophysics' request on the grounds that the material sought was privileged from disclosure under exemptions 7(A), (C), (D) and (5) of the FOIA (A. 59a-62a). The Regional Director refused to disclose employee affidavits and union authorization cards on grounds that such disclosure (1) would substantially deter employees' voluntary cooperation with the Board and thus hinder present and future enforcement proceedings, (2) would be inimical to the adversarial process and do violence to the historic privilege against disclosure of an attorney's work product, (3) would constitute an invasion of privacy of the individuals involved, and (4) would improperly reveal the identities of confidential sources (A. 59a-61a). In addition to these grounds, the Regional Director further refused Biophysics' "dragnet request" for numerous

records and documentary materials on the basis that such materials were privileged from disclosure because they clearly reflected the deliberative and consultative process of the agency (A. 61a). Biophysics appealed the Regional Director's decision to the Board's General Counsel, who affirmed the Regional Director's denial of disclosure on July 29, 1975, "substantially for the reasons set forth in the Regional Director's letter of June 20, 1975" (A. 86a-87a).

Meanwhile, on July 7, 1975, the Board issued a subpoena duces tecum directing Biophysics to appear and produce certain books and records at the hearing before an Administrative Law Judge of the Board on the unfair labor practice complaint (A. 43a-44a). On July 10, Biophysics filed a petition to revoke the subpoena (A. 48a-50a), along with supporting documents (A. 51a-78a). The Board's General Counsel opposed the petition to revoke (A. 79a-81a), and on July 18, 1975, Administrative Law Judge Leff denied that petition on grounds that the documents subpoenaed by the Board appeared reasonably related to the matters in issue (A. 83a). By letter of August 13, 1975, Biophysics refused to obey the subpoena duces tecum (A. 87a(1)).

II. THE DISTRICT COURT PROCEEDINGS

On January 7, 1976, the Board applied to the District Court for enforcement of the Board's subpoena duces tecum (A. 8a-13a). Biophysics affirmatively defended and counterclaimed against the Board's General Counsel and Regional Director seeking judicial review of the General Counsel's refusal to supply the employee affidavits and other materials

Biophysics had requested under the Freedom of Information Act (A. 88a-104a). On January 15, 1976, the Board moved for an order pursuant to Rule 12(b)(6), Fed. R. Civ. P., dismissing Biophysics' counterclaims for failure to state a claim upon which relief could be granted, or, in the alternative, for an order granting summary judgment pursuant to Rule 56(c), Fed. R. Civ. P. (A. 141a, 107a-109a). The parties then resolved the subpoena matter, leaving before the District Court only the Board's motion addressed to Biophysics' FOIA counterclaims (A. 141a).

On April 12, 1976, the District Court issued its opinion and order granting the Board's motion for summary judgment and dismissing Biophysics' counterclaims (A. 140a-147a). Ten days before the District Court's opinion and order issued, this Court decided Title Guarantee Co. v. National Labor Relations Board, 534 F. 2d 484 (C.A. 2, 1976), certiorari denied, U.S. , Docket No. 75-1880, October 4, 1976. The District Court stated that although the holding in Title Guarantee involved only statements of employees and union representatives and not the additional material requested here, the District Court "believe[d] Title Guarantee to be dispositive of the instant controversy" (A. 142a). After citing at length from Title Guarantee, the District Court held that employee affidavits "[c]learly . . . need not be disclosed at this stage" under Exemption 7(A) (A. 144a). With respect to Biophysics' request for union authorization cards, the District Court found the cards privileged from disclosure both under Exemption 7(A) and under Exemption 7(C) (A. 145a-146a). The Court found Exemption 7(A)

applicable because such disclosure "would definitely tend to 'chill' employees in the exercise of their protected rights to seek a representation election" and because "the cooperation of employees involved in this unfair labor practice proceeding might well diminish if they learned the NLRB had turned over their authorization cards" (A. 145a). The Court also found applicable Exemption 7(C), which precludes disclosure constituting an unwarranted invasion of personal privacy, on the ground that "[t]he interest in confidentiality which attaches to a union authorization card approaches that which surrounds the secret ballot in an election" (A. 146a). Regarding the remaining records and documentary materials which Biophysics had requested, the District Court stated that "the reasoning of the Second Circuit [in Title Guarantee] indicates that the additional material requested is also exempt," noting this Court's approval of the Board's expressed fear that disclosure of investigative material would permit suspected violators to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied (A. 144a).[3/]

3/ At the hearing before the district court, counsel for the Board submitted copies of the material in dispute to the court for in camera inspection. The Board is currently in the process of securing the transfer of these documents to this Court to enable it to inspect the documents in camera if it so desires.

ARGUMENT

THE DISTRICT COURT PROPERLY CONCLUDED THAT ALL OF THE MATERIAL BIOPHYSICS REQUESTED IS EXEMPT UNDER THE FOIA

The district court properly concluded that the requested documents were protected from compelled disclosure by Exemptions 7(A) and 7(C) in Subsection (b) of the FOIA. Moreover, the district court's determination that the documents are exempt is sustainable on several grounds in addition to those on which the court predicated its holding.

First, as shown in Section I below, the district court properly found that all of the documents at issue are within Exemption 7(A) of the FOIA, which applies to "investigatory records compiled for law enforcement purposes" to the extent that their production would "interfere with enforcement proceedings." Premature disclosure of the results of the agency's pre-litigation investigation could seriously hamper subsequent enforcement proceedings.

Second, as shown in Section II, the district court properly found that the authorization cards for which Exemption 7(C) was claimed contained material of such a nature that their production would "constitute an unwarranted invasion of personal privacy." In addition, we will also show that many of the other documents sought by Biophysics, including affidavits, notes of interviews of potential witnesses, and agency memoranda, include personal information privileged from disclosure under Exemption 7(C) because there is no legitimate public interest in disclosure.

Third, as shown in Section III, many of the documents at issue are within Exemption 7(D) of the FOIA, which applies to investigatory records compiled for law enforcement purposes which would "disclose the identity of a confidential source." If the production of these documents is compelled, the result would be disclosure of details concerning witnesses who have been expressly promised confidentiality by a Board agent.

Finally, as shown in Section IV, many of the memoranda, notes, affidavits and other evidence in the Board's file are within Exemption 5 of the FOIA because they are trial preparation material which would normally be privileged in a civil discovery context and because an executive privilege protects predecisional communications from disclosure.

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT ALL OF THE DOCUMENTS DEFINED BY BIOPHYSICS' REQUEST ARE PROTECTED FROM DISCLOSURE BY EXEMPTION 7(A) OF THE FOIA

A. Investigatory records related to pending enforcement proceedings are within Exemption 7(A) when their disclosure would result in earlier or greater access to the Government's case than that directly available in a proceeding

Exemption 7, as amended, provides for nondisclosure of investigatory records where disclosure would "interfere with enforcement proceedings." 5 U.S.C. §552(b)(7)(A). This provision embodies the reaffirmation of

the purpose of the original Exemption 7 "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 Cong. Rec. 17033 (Remarks of Senator Hart) (1974). Disclosure of the Board's investigatory records sought by Biophysics in the instant case would result in the premature release of information not otherwise available to litigants before the Board, would deter individuals with relevant information from cooperating in Board investigations, and would therefore interfere with Board proceedings within the meaning of Exemption 7(A).

In Title Guarantee Co. v. N.L.R.B., supra, 534 F. 2d at 492, this Court held that Exemption 7(A) protected from prehearing disclosure witness statements obtained from employees or their representatives. The Court's reasoning, however, is plainly applicable to other investigatory records as well. Thus, the Court specifically rejected Title Guarantee's contention that the amendment of Exemption 7 provides litigants in Board proceedings with a means of obtaining prehearing discovery. Noting the legal precedents upholding Board procedures barring such discovery the Court concluded (534 F. 2d 491-492):

> We are not prepared to hold that disclosure may be required under the FOIA in connection with an ongoing unfair labor practice enforcement proceeding . . . . We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending

> enforcement proceedings by virtue of a backdoor amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or by a blanket amendment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendments to the FOIA that any such modifications of agency discovery rules was intended.

To the contrary, as the other courts of appeals following Title Guarantee agree: "The 1974 amendments were not meant . . . to transfer the adjudication of such discovery disputes from the NLRB to the courts." Roger Au and Sons, Inc. v. N.L.R.B., 538 F. 2d 80, 83 (C.A. 3, 1976). Accord: Goodfriend Western Corp. v. Fuchs, 535 F. 2d 145, 147 (C.A. 1, 1976), petition for certiorari pending, Docket No. 76-51 ("[W]e do not believe that Congress intended to transfer from the Board to the courts the case-by-case adjudication of discovery disputes in unfair labor practice proceedings."); Climax Molybdenum Co. v. N.L.R.B., F. 2d , 92 LRRM 3466, 3468 (C.A. 10, 1976). ("The court is ill-fitted to make such determinations. It is impossible to believe that Congress intended to call upon the federal courts to perform this task.")[4/]

The instant FOIA action is plainly an attempt by a litigant in an active enforcement proceeding to use the FOIA to secure documents to

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4/ And as noted above, according to Senator Hart, the 1974 amendments were designed to "prevent the harm to the government's case in court by not allowing an opposing litigant earlier or greater access than he would otherwise have." Roger Au and Sons, Inc. v. N.L.R.B., supra, quoting 120 Cong. Rec. 17033 (1974).

which it would not be routinely entitled in such a proceeding. Biophysics has specifically advised the Board that it seeks disclosure "to prepare this case for the [unfair labor practice] hearing presently scheduled . . ." (A. 63a, 49a). Accordingly, the district court was correct in holding such documents privileged from disclosure under Exemption 7(A).

Moreover, as the Title Guarantee Court concluded, several policy considerations underlying the Board's refusal to allow prehearing discovery also constitute the harms against which exemption 7(A) was designed to protect. The Court expressly agreed with the Board's position that premature disclosure would interfere with the Board's proceedings by enabling "suspected violators . . . to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied." (supra, 534 F. 2d at 491) [5/] and further by making employees and union representatives reluctant to give information to the Board for fear, in the case of employees, of "incurring employer displeasure" and, in the case of union representatives, of "compromising the union's position in negotiations." Id. More recently, decisions by the First, Third and Tenth Circuits have voiced express agreement with this Court's interpretation and application of Exemption 7(A) in Title Guarantee. Goodfriend Western Corp. v. Fuchs, supra; Roger Au and Son, Inc. v. N.L.R.B., supra; Climax Molybdenum Co. v. N.L.R.B., supra.

5/ See also, Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427, 431 (C.A. 4, 1974), cert. denied, 419 U.S. 834; Wellford v. Hardin, 444 F. 2d 21, 23 (C.A. 4, 1971).

Although only witness statements were at issue, the rationale behind Exemption 7(A) as expressed in Title Guarantee would clearly extend to other parts of the General Counsel's trial preparation. The documents in question here include notes and memoranda prepared by Board agents (e.g., Items 124, 129, 149, 156), letters (e.g., Item 141) and documentary evidence including such items as union authorization cards signed by Biophysics' employees (e.g., Items 163, 164). Like the affidavits (e.g., Items 144, 159, 160, 162), they contain the names of sources of Board evidence and information concerning the alleged unfair labor practices upon which the Board will base its case. The notes and memoranda discuss the strengths and weaknesses of the evidence and contain analyses of legal theories and litigation strategies. These documents are not normally discoverable under the Board's rules. Hence, to protect the Board's case from premature disclosure -- to prevent respondents from learning the Board's case in advance and to protect Board sources from "incurring employer displeasure" -- it is equally necessary to protect from compelled production the notes, memoranda and other investigative documents in the Board's files.

More specifically, as to union authorization cards signed by Company employees, it is clear that whether obtained during the investigation of an unfair labor practice or a representation case, their disclosure would "interfere with enforcement proceedings" of the Board. Thus, in certain kinds of unfair labor practice cases the Board uses authorization cards as documentary evidence of employee support of a

union. For example, where an employer commits unfair labor practices during a union organizing campaign that preclude the holding of a fair election, the Board may order the employer to bargain with the union without an election if there is a showing of sufficient employee support. See N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 607 (1969). However, in such cases the card signers must often be called as witnesses by the General Counsel to demonstrate that the cards were authentic and properly solicited. The validity of authorization cards may also be at issue in cases where an employer is alleged to have unlawfully assisted in a union campaign. Thus, for example, where a company supervisor is alleged to have unlawfully solicited employee signatures on union authorization cards, the card signers may be required to testify as to the circumstances of their solicitation. See A and S Electronic Die Corp. 172 NLRB 1478, 1481-1482 (1968), enf'd., 423 F. 2d 218, 221 (C.A. 2, 1970), cert. denied, 400 U.S. 833. Just as in the case of employees who provide Board agents with affidavits, authorization card signers in such circumstances are likely to be called by the General Counsel as witnesses in the Administrative Law Judge hearing. Premature disclosure of the authorization cards in these instances would be tantamount to disclosure of the Board's case in advance, would allow employers to construct defenses and, finally, would subject the employee card signers to possible employer displeasure and harassment.

And premature disclosure of authorization cards in a representation proceeding would be **no less detrimental to legitimate employee and** Board interests. To begin with, a Board representation proceeding is plainly an "enforcement proceeding" within the meaning of Exemption 7(A). In Wellman Industries, Inc. v. N.L.R.B., supra, 490 F. 2d at 430, the Fourth Circuit rejected a "narrow" view of the term "law enforcement purposes" in Exemption 7 as it existed before the 1974 amendment, and found that affidavits secured in an investigation of objections to a Board-conducted representation election were protected from disclosure by Exemption 7. The Court recognized that there was no certainty that unfair labor practice proceedings would be triggered by such an investigation but concluded (id., at 430):

> Whether or not resulting in an unfair labor practice charge, the Board's purpose here was to protect and vindicate rights set out in Section 7. Though procedures vary, if aimed at enforcement of the NLRA we think that they are "for law enforcement purposes."

In representation cases the Board often holds evidentiary hearings both before and after the election to determine the scope of an appropriate employee unit or whether unlawful campaign tactics were employed by one of the parties. The most likely candidates for union witnesses at these hearings have typically been those employees who earlier demonstrated their support for the union -- the card signers. Just as in unfair labor practice cases, disclosure of the authorization cards in such representation proceedings would thus subject the employee

signer to the harassment of the unscrupulous employer desirous of shaping its employees' subsequent testimony.

Disclosure of the authorization cards would also interfere with enforcement proceedings by undermining employee free choice in elections. Thus, by examining the cards an employer could determine which employees supported the Union. With this information an employer could engage in a pre-election campaign to destroy union support through discharge and other forms of coercion aimed at the card-signing employees. Alternatively, specific threats would not even have to be made. Because of the special relationship between employer and employee, an employer need do no more than simply warn employees that it knew which employees were supporting the union. The message would be clear and card signing employees fearing employer retaliation might then vote against the union in the hope of averting employer harassment. The Board's fear of such consequences is strongly supported by the numerous Board and Court decisions finding employers guilty of coercive pre-election tactics. See, e.g., N.L.R.B., v. Historic Smithville Inn, 414 F. 2d 1358, 1359-1362 (C.A. 3, 1969), cert. denied, 397 U.S. 908; N.L.R.B. v. Nichols-Dover, Inc., 414 F. 2d 561, 562-564 (C.A. 3, 1969), cert. denied, 397 U.S. 96; N.L.R.B. v. Crown Laundry, Inc., 437 F. 2d 290 (C.A. 5, 1971); Operating Engineers, Local 49 v. N.L.R.B., 353 F. 2d 852, 856 (C.A.D.C., 1965). Moreover, even where an employer has no intention of using the authorization cards to sharpen its focus in an anti-union campaign, an employee's knowledge of his employer's access to

his authorization card may reasonably be expected to cause the card signer to fear that he will be the subject of company retaliation. 6/

A final example of interference likely to result from authorization card disclosure is interference with the initiation of the Board's representation case proceedings. Section 9 of the Act provides that employees and unions may petition the Board to obtain Board-conducted secret ballot elections to determine whether a majority of employees desire union representation. If the union wins the election, the Board will certify the union as the employees' bargaining representative and the employer must then bargain with the union. However, the Board generally requires that the petition be supported by a substantial showing of employee interest. Typically this is accomplished by submitting a number of authorization cards with the petition. It is reasonable to assume that if employees become aware of employer access to authorization cards submitted to the Board, many would refuse to sign cards or give a campaigning labor organization any other documentary evidence of their support. Clearly, the end result would be to limit employee access to the Board's representation processes and to restrict the degree of Section 7 protection an employee could expect from the

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6/ The circuit courts have recognized that it is impossible to know in advance whether an employer would use requested material to interfere with enforcement proceedings. Accordingly, the courts have held that Board files are exempt from disclosure where disclosure would enable an unscrupulous employer to coerce employees or fabricate defenses and have not required proof that the specific employer seeking disclosure intended to take such action. See Roger Au and Son, Inc. v. N.L.R.B., supra, 538 F. 2d at 83 ; Title Guarantee Co. v. N.L.R.B., supra, 534 F. 2d at 491.

Board. Indeed, long before enactment of the FOIA, the Board itself recognized that disclosure of authorization cards would undermine the election process. Thus, during its investigation in a representation proceeding the Board

> endeavors to keep the identity of the employees involved secret from the employer and from other participating labor organizations. It does so, first, because the Act places upon it the responsibility for investigation of questions concerning representation when raised by a petition filed under 9(c); second, because the disclosure of the identity of the employees involved to other parties tends to destroy the secrecy of the ballot, and the integrity of the Board's process . . . .

S.H. Kress & Co., 137 NLRB 1244, 1248 (1962), enf. denied on other grounds, 317 F. 2d 225 (C.A. 9, 1963).[7/]

For all of these reasons, disclosure of the documents sought would plainly interfere with ongoing enforcement proceedings within the meaning of Exemption 7(A).

7/ When providing for secret ballot elections under Section 9, Congress recognized that disclosure of an employee's union attitudes would interfere with the free selection or rejection of union representation. See Brooks v. N.L.R.B., 348 U.S. 96, 99-100 (1954); N.L.R.B. v. A.J. Tower Co., 329 U.S. 324, 331-332 (1946). The Board and the courts have also recognized that the threat of identification as a union supporter is often sufficient to prevent an employee from exercising his section 7 rights. See Murray Ohio Mfg. Co., 156 NLRB 840, 844-845 (1966); N.L.R.B. v. Pioneer Plastics Corp., 379 F. 2d 301, 303-304 (C.A. 1, 1967) cert. denied, 389 U.S. 929; N.L.R.B. v. McCormick Concrete Co., 371 F. 2d 149, 151 (C.A. 4, 1967); N.L.R.B. v. Historic Smithville Inn, 414 F. 2d 1358, 1359-1362 (C.A. 3, 1969), cert. denied, 397 U.S. 908. Accord: Title Guarantee Co. v. N.L.R.B., supra.

B. Biophysics' other contentions are without merit.

Biophysics argues that the "exculpatory material" it seeks here is "precisely that [material] which Congress intended it to have when it enacted the FOIA" (Br. 16-17). This contention is patently without merit. As noted above, the NLRA does not specifically authorize or require pre-trial discovery; the availability of such discovery is a matter for the Board's discretion; and the Board's rules do not, in fact, provide for pre-hearing discovery. N.L.R.B. v. Interboro Contractors, Inc., 432 F. 2d 854, 858 (C.A. 2, 1970), cert. denied, 402 U.S. 915. The legislative history of the 1974 amendments [8/] and, the Supreme Court's decision in Sears makes clear the FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants." N.L.R.B. v. Sears Roebuck, and Co., 421 U.S. 132, 143 n. 10 (1975). Furthermore, as this Court expressly concluded in Title Guarantee: "We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a backdoor amendment to the FOIA . . . ." 534 F. 2d at 491-492. [9/]

8/ See statement by Senator Hart, 120 Cong. Rec. 17033 (1974) quoted infra, footnote 9.

9/ The Senate Report which Biophysics cites to support its contention refers not to evidence of unlawful conduct gathered by federal agencies during enforcement efforts but rather describes Congressional concern that citizens would lose "a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen because he had no way in which to discover it." S. Rep. No. 813, 89th Cong., 1st. Sess (1966) at p. 7 (emphasis added). To remedy this situation, Congress caused an indexing requirement to be included in the FOIC. The Senate Report does not support Biophysics' (continued)

Biophysics also contends that its due process rights require disclosure of the exculpatory material. However, the material in the Board's files does not lend itself to classification by categories so that clearly or even conceivably exculpatory documents could be separated for disclosure. As the Tenth Circuit concluded in North American Rockwell Corporation v. N.L.R.B., 389 F. 2d 866, 873 (1968): "Brady [Brady v. State of Maryland, 373 U.S. 83 (1963)] did not declare that a prosecutor must on demand comb his files for bits and pieces of evidence which conceivably could be favorable to the defense. That would be the effect of upholding petitioner's demand." In any event it is well established that the statutory review procedures set forth in Section 10(e) and (f) of the National Labor Relations Act (29 U.S.C. §160(e) and (f)) are the exclusive procedures for assertions, such as those made here, of deprivation of rights guaranteed by the Constitution and the National Labor Relations Act. See, e.g., Sears, Roebuck & Co. v. N.L.R.B., 433 F. 2d 210, 211 (C.A. 6, 1970); Polymers, Inc. v. N.L.R.B., 414 F. 2d 999, 1005-1006 (C.A. 2, 1969), cert. denied, 396 U.S. 1010; Vapor Blast Mfg. Co. v. Madden, 280 F. 2d 205, 209 (C.A. 7, 1960), cert. denied, 364 U.S. 910.[10/]

9/ prehearing disclosure claims here; indeed, as noted, Senator Hart in offering his amendments explained: the original purpose of Congress in enacting Exemption 7 was "to prevent harm to the Government's case in Court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 Cong. Rec. 17033 (1974).

10/ Compare Smith v. Schlesinger, 513 F. 2d 462, 475-476 (C.A.D.C., 1975), where on appeal from a district court decision, the court expressly noted that the "peculiar circumstances of a revocation based on an alleged mental illness . . . requires special attention to procedural rights."

The Company also contends that since it seeks only information "favorable to the employer" (Br. 17), that it is unlikely that disclosure would "chill" employees in the exercise of their protected rights. This contention ignores the realities of the situation. Since most affidavits are obtained during the period before a complaint issues, they often contain facts relating to charges which are later dropped or deferred to arbitration, as well as background information immaterial to any issues which might later be litigated. At the time the statements are obtained, it is often impossible for the General Counsel to tell whether or not any of the information in the statement will benefit his case, because it has not yet been decided whether or not a complaint will issue. It follows that statement-givers often will not know at the time their statements are taken what issues will ultimately be litigated and whether or not their information will be helpful or harmful to the General Counsel's case. Indeed, Board statements often contain discussion of such sensitive matters as the union activity of the witness and his co-workers and supervisors, and the relationship of the witness and his supervisors. Such information may ultimately prove to be exculpatory in nature and therefore the witness who candidly reveals these matters to Board agents has good reason to fear offending his employer, his supervisors and his fellow workers, wholly apart from whether his statement shows the employer to be in violation of the Act.

For these reasons, the documents sought by Biophysics are exempted from disclosure by Exemption 7(A) of the FOIA.[11/]

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT DISCLOSURE OF CERTAIN REQUESTED MATERIALS WOULD CONSTITUTE AN UNWARRANTED INVASION OF PERSONAL PRIVACY WITHIN THE MEANING OF THE EXEMPTION 7(C)

Exemption 7(C) exempts investigatory records from disclosure where disclosure would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C). This exemption is a more comprehensive counterpart of Exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Unlike Exemption 7(A), which protects important government functions, Exemption 7(C) and Exemption 6 protect the individual's interest in personal privacy against the danger of unwarranted public exposure of potentially embarrassing information. Ditlow v. Shultz, 517 F. 2d 166, 170 (C.A.D.C., 1975). As Senator Hart explained (120 Cong. Rec. 17033 (1974)):

> By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh. I wish also to make clear, in case there is any doubt, that this

11/ In Sections II, III, and IV below, we show that some of the documents or portions thereof also come within Exemptions 7(C), 7(D) and 5 of the FOIA, but this Court need not reach those issues if it determines that General Counsel's contentions with respect to 7(A) are correct. See Title Guarantee Co. v. N.L.R.B., supra, 534 F. 2d at 489; Wellman Industries, Inc. v. N.L.R.B., supra, 490 F. 2d at 429.

> clause is intended to protect the privacy of any person who is mentioned in the requested files, and not only the person who is the object of the investigation.

Accordingly, the cases construing Exemption 6 provide an appropriate frame of reference for the consideration of Exemption 7(C).

The Supreme Court recently observed, quoting from the Senate Report on Exemption 6:

> "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information."

Dept. of Air Force v. Rose, 44 U.S.L.W. 4503, 4509 (decided April 21, 1976), quoting S. Rep. No. 813, 89th Cong., 1st Sess. at 9 (1965).[12/]

The use of the term "clearly" in Exemption 6 was held to require that courts "tilt the balance in favor of disclosure." Getman v. N.L.R.B., supra. However, the legislative history of the 1974 amendment of Exemption 7 stands "in marked contrast" to that of Exemption 6. In response to President Ford's objection that this language did not sufficiently protect personal privacy with regard to investigatory files, Congress deleted the word "clearly" from Exemption 7(C). Dept. of Air Force v. Rose, supra, 44 U.S.L.W. at 4511 n. 16 (citing legislative history). This "purposeful omission" insures that personal privacy will

12/ See also Rural Housing Alliance v. U.S. Dept. of Agriculture, 498 F. 2d 73, 77 (C.A.D.C., 1974); Getman v. N.L.R.B., 450 F. 2d 670, 674 (C.A.D.C., 1971).

be afforded greater protection under Exemption 7(C) since the balance is no longer tilted in favor of disclosure. Deering Milliken, Inc. v. Nash, F. Supp. , 90 LRRM 3138, 3140 (D.S.C., 1975). Thus, Board investigatory records containing potentially embarrassing information are not subject to disclosure under the FOIA unless the invasion of privacy is warranted by a demonstrably strong public interest in the release of the information. As shown, infra, disclosure of many of the documents requested in the instant case[13/] would constitute an extreme invasion of the personal privacy of many persons whose statements or authorization cards were supplied the Board or who were mentioned or described in the statements provided by others.[14/]

In order to apply such a balancing test, it is necessary first to identify the privacy interests and the public interest involved. The term "personal privacy" is not defined in either the FOIA or its

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13/ I.e., witness statements (e.g., Items 144, 147, 150, 159), notes made in preparation for and summarizing facts obtained during witness interviews (e.g., Items 124, 149), memoranda and agenda minutes containing such information (e.g., Items 130, 146, 156, 122) and employee authorization cards.

14/ The Board may disclose affidavits (pursuant to Section 102.118(b) of the Board's Rules and Regulations) or authorization cards during Board proceedings where their introduction may be required either procedurally or substantively to support an order against an employer whose unfair labor practices have undermined employee rights. Disclosure is warranted under those circumstances because it is necessary to prevent the wrongdoing employer from denying the Act's benefits to his employees or to effectuate the affiants' or card signers' desire for union representation. As shown infra, however, the requested disclosure in the instant case would serve no such compelling public purpose and would accordingly constitute an "unwarranted invasion of personal privacy."

legislative history. An individual's right to prevent involuntary dissemination of his beliefs has, however, long been recognized as a basic tenet of American jurisprudence. As Warren and Brandeis stated in their seminal work on "The Right to Privacy" (4 Harv. L. Rev. 193, 198 (1890):

> The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.

Justice Brandeis found this right protected by the Constitution in a dissenting opinion subsequently quoted with approval by the Supreme Court:

> "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and most valued by civilized man."15/

Of course, most governmental functions would be frustrated if individuals refused to provide information to the government regarding their thoughts and actions. Indeed, the Board could not effectively administer the Act if individuals did not give statements to Board agents investigating unfair labor practices, or did not sign authorization cards or did not cast election ballots. An individual's willingness to

15/ Stanley v. Georgia, 394 U.S. 557, 564 (1964), quoting from Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

provide the necessary information is clearly founded upon the assumption that information furnished for one purpose will not be used for another not anticipated by the individual. "The intrusion is tolerable only if public disclosure of the fruits of the intrusion is forbidden." Bloustein, "Privacy As An Aspect of Human Dignity," 39 N.Y.U. L. Rev. 962, 999 (1964). Congress explicitly recognized the individual's interest in limiting the dissemination of personal information when it enacted the Privacy Act of 1974; Section 2(b)(2) specifically provided that the Act's purpose was to enable "an individual to prevent records pertaining to him obtained by [the government] for a particular purpose from being used or made available for another purpose without his consent." 5 U.S.C. Sec. 552a (88 Stat. 1896, et seq.).[16/]

It is therefore clear that the individual's most basic privacy right - the right to limit the communication of his thoughts - has been violated where the government receives information from individuals for one purpose and subsequently disseminates that information in a manner unrelated to the purpose for which the information was received.

Affidavits obtained during an unfair labor practice investigation are secured for two purposes: (1) to provide a basis for deciding whether issuance of a complaint is warranted, and (2) to aid Board attorneys in preparation for litigation if complaint issues. As noted,

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16/ Congress' concurrent consideration of the Privacy Act and Exemption 7(C) of the FOIA in 1974 indicates that the purposes of the Privacy Act are relevant in determining the scope of the privacy interest protected by Exemption 7(C). See, e.g., Hulett, "Privacy and the Freedom of Information Act," 27 Admin. L. Rev. 275 (1975).

supra, footnote 14, such affidavits will be made available pursuant to the Board's Rules for purposes of cross-examination after the affiant testifies at the hearing. Similarly, authorization cards are generally presented to Board agents for certain limited purposes such as to obtain a Board conducted representation election. These cards are and should be secure from disclosure unless and until unfair labor practices prevent the employees from participating in a free election and the cards are needed in an unfair labor practice hearing.

Inasmuch as these are the only purposes for which the documents in the instant case were provided to the Board, their disclosure to Biophysics at this time would clearly result in an unanticipated dissemination of employees' views and would, accordingly, constitute an invasion of employees' personal privacy within the meaning of Exemption 7(C).[17/]

The seriousness of the threatened invasion of privacy is underscored by the sensitive nature of the information which would be revealed if the affidavits, notes, memoranda and authorization cards were disclosed. Employees' attitudes concerning unions have long been recognized as private, personal matters as to which employees enjoy

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17/ Many of the notes and memoranda sought here were drafted in preparation for and as a result of interviews with Board witnesses. They reveal much personal information about the union activities of Company employees secured through these witness' statements (e.g., Items 124, 149). Hence, it is clear that disclosure to "any person" (5 U.S.C. 552(a)(3)) under the FOIA, and particularly to their employer, would constitute an involuntary and unwarranted communication of employees' union attitudes.

the "right to be left alone." Stanley v. Georgia, supra. Long before the enactment of the FOIA, the Board in S.H. Kress & Co., supra, 137 NLRB at 1248-1249, observed that when an employer questions his employees in order to determine whether they have signed union cards he

> infringe[s] upon the employees' right to privacy in their union affairs, a right necessary to the full and free exercise of the organizational rights guaranteed to employees by Section 7 of the Act.

Unauthorized disclosure of an employee's union sentiments has often led to employer or union discrimination and conflict or embarrassment in the employee's relationship with his fellow employees and supervisors. The dangers posed by such disclosure of employee attitudes have been repeatedly recognized in Board and court decisions prohibiting employer surveillance of union activities, employer interrogation of individual employees regarding their union support, and employer polling of employees except by secret ballot and under carefully prescribed conditions. See cases cited, supra, p. 16.[18/] The personal and

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18/ In S.H. Kress & Co., supra, the Board acknowledged its own obligation to protect this privacy interest by preserving the confidentiality of authorization cards that employees had given to the Board for a limited purpose (137 NLRB at 1248):

> The Board cannot, in good conscience, permit a rule adopted for its own convenience as an administrative expedient, to be turned into a procedure by which an employer can inform itself of the identity of employee leaders of organizational campaigns. The cases are commonplace in which employer knowledge of such leaders has been but the first step to retaliatory

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private nature of employees' union sentiments is emphasized by the Act's command that Board elections be conducted by secret ballot and by the emphasis the Board places upon preserving the sanctity of the ballot box in Board elections. See NLRA Sec. 9(c)(1); NLRB Case-handling Manual, Sec. 11316-11344.[19/]

Protection of these privacy interests has repeatedly been extended to employees whose union sympathies have been disclosed to the Board either by giving statements to Board agents investigating unfair labor practice charges, or by signing authorization cards subsequently submitted to the Board to demonstrate employee support for a Board election. Information contained in statements given to Board agents has been considered so sensitive that employers risk violating the Act merely by requesting an employee to disclose the contents of his or her affidavit. Compare Henry L. Siegel Co. v. N.L.R.B., 328 F. 2d 25, 27 (C.A. 2, 1964) with N.L.R.B. v. Martin A. Gleason, 534 F. 2d 466, 480-481 (C.A. 2, 1976). The employer may have a legitimate

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18/ and discriminatory action against employees for the patent purpose of restraining, interfering with, and thwarting their organizational activity; [footnote omitted] especially this is so during the incipient stages of organizational campaigns.

19/ It is clear that the danger in the instant case of discharge is far more serious than the danger the Third Circuit sought to avoid in Wine Hobby USA, Inc. v. U.S.I.R.S., 502 F. 2d 133 (C.A. 3, 1974), of receiving unsolicited mail. It is also clear that the embarrassment resulting from disclosure of wine processing activities was neither as imminent nor as severe as the possibility of social embarrassment and ostracism which may result in the instant case upon unauthorized disclosure of the union attitudes of Biophysics employees.

interest in obtaining the statement, but the law protects the employee against involuntary disclosure of its contents because of the sensitive information which it is likely to contain about particular employees' activities and attitudes toward their union and employer. Indeed, employers and unions are not permitted to gain access to such statements, even when they are formally charged with a violation and seek discovery against the General Counsel, because of the necessity of forestalling "intimidation and harassment which would otherwise be possible because of the leverage inherent in the employer-employee relationship." Title Guarantee Co. v. N.L.R.B., supra, 534 F. 2d at 491.[20/] See also N.L.R.B. v. J. I. Case and Co., 201 F. 2d 597, 600 (1953) where the Ninth Circuit refused to allow an employer to litigate the sufficiency of a union's showing of interest, noting that "[a]mong other undesirable consequences, a trial of that nature would bring about disclosure of the individual employees' desires with respect to representation and would violate the long-established policy of secrecy of the employees' choice in such matters."

20/ Of course, any statement given to the Board in the course of an investigation might contain private information about employees, even if the affiant himself is not an employee. Exemption 7(C), for example, would as readily exempt a union representative's statement describing the views employees had expressed toward the union and the employer at an organizational meeting. Cf. Title Guarantee Co. v. N.L.R.B., supra.

Having established that disclosure of the documents sought in this case would result in serious invasions of personal privacy, it is necessary to determine whether, on balance, that result is "unwarranted." For the purposes of such balancing, the relevant consideration is not the need of the individual requesting the information, but rather whether the disclosure of the information will serve a public purpose of sufficient importance to justify the invasion of privacy. Thus, where no direct or indirect public purpose for disclosure can be identified, the invasion of privacy is unwarranted. Wine Hobby U.S.A., Inc. v. U.S.I.R.S., supra, 502 F. 2d at 137. 21/

21/ Where the courts have ordered disclosure of potentially embarassing material, the information has either been of interest to the general public or sought by academic groups acting in the public interest. See Robles v. E.P.A., 484 F. 2d 843 (C.A. 4, 1973) (levels of nuclear radiation in a community); Ackerly v. Ley, 420 F. 2d 1336 (C.A.D.C., 1969) (danger from exposure to carbon tetrachloride); Dept. of Air Force v. Rose, 44 U.S.L.W. 4503, 4511 n. 16 (decided April 21, 1976) (summaries of disciplinary actions sought by law review for comparative study); Getman v. N.L.R.B., 450 F. 2d 670 (C.A.D.C., 1971) (names and addresses of eligible voters in 35 scheduled elections sought by law professors studying empirical basis for Board's assumptions regarding employees' reactions to campaign tactics). Getman v. N.L.R.B., supra, is the only appellate court decision to rule on the applicability of the privacy exemptions to Board files. Although the court rejected the Board's contention that the information was within Exemption 6, the Court's reasoning strongly suggests that disclosure of the material sought in the instant case (for which the Board claims Exemption 7 protection) would constitute a "unwarranted invasion of personal privacy." Thus, the court in Getman emphasized that disclosure of the requested material would not reveal employees' union attitudes or other embarassing information and that elaborate precautions had been taken to assure that the interviews would not interfere with the employees' votes in the elections. Id. at 676. The court also emphasized that the plaintiffs were respected professors, that the study held "unusual promise" for testing "the behaviorial basis on

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Biophysics has explicitly stated that it seeks disclosure of the material "to prepare this case for the [unfair labor practice] hearing presently scheduled . . ." (A. 63a). Not only is there no public interest or benefit to be derived from such disclosure, but, as noted, the purpose of the FOIA is not to provide parties in litigation with government agencies an alternative means of obtaining discovery.[22/] On the contrary, Exemption 7 of the FOIA was conceived and drafted "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 Cong. Rec. 17033 (Remarks of Senator Hart (1974)).

One final factor which must be considered in determining whether the invasion of privacy inherent in disclosure of the affidavits and other documents is "unwarranted" is the availability of similar information from alternate sources. See Ditlow v. Shultz, 517 F. 2d 166, 172-173 (C.A.D.C., 1975); Rural Housing Alliance v. U.S. Dept. of Agr., supra,

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21/ which an important body of labor law is founded," and that the study could not be conducted without disclosure of the requested information. Id. at 676-677. Recognizing that disclosure of even names and addresses might expose employees to harrassment, the court specifically warned that "a request by less well qualified applicants, or applicants with a less carefully designed or more disruptive study would require a new balancing and might be found to involve a 'clearly unwarranted invasion of personal privacy' which would justify nondisclosure." Id. at 677 n. 24. In the instant case, by contrast, disclosure of the affidavits, notes, memoranda and authorization cards would directly reveal the employees' union attitudes, and no precautions can be taken to assure that the information will not be used to coerce the employees. Biophysics is a private employer acting in its own interests, and disclosure of the documents will result in no public benefit.

22/ See discussion, supra, at pp. 10-12.

498 F. 2d at 83; Getman v. N.L.R.B., supra, 450 F. 2d at 676-677. As noted above, under the NLRA an employer has a right to interview employees for the purpose of discovering facts within the scope of a Board complaint so long as he does not go beyond the necessities of trial preparation and employs the requisite safeguards against intimidation. N.L.R.B. v. Winn-Dixie Stores, 341 F. 2d 750, 753 (C.A. 6, 1965) cert. denied, 382 U.S. 830; Texas Industries, Inc. v. N.L.R.B., 336 F. 2d 128, 133 (C.A. 5, 1964). The availability of this method of obtaining information is not diminished by the fact that an employee may refuse to cooperate with the employer. "A refusal under such circumstances would be tantamount to an admission that the statement contained matter which the employee wished to conceal from the employer." Texas Industries, Inc. v. N.L.R.B., supra, 336 F. 2d at 134. Similarly, this approach would enable the individuals involved to determine what information they wished to communicate, preserving their private affairs from unauthorized or unwarranted intrusion. See Rural Housing Alliance v. U.S. Dept of Agr., supra.

In sum, disclosure of the affidavits, notes, memoranda and authorization cards sought would constitute an immediate and direct intrusion upon the privacy interests of those individuals who assisted Union's organizing campaign or cooperated with the Board's investigation and of any other individuals identified in the documents. Disclosure would serve only the private interests of the Company and would not further any public interests. It is therefore clear that the privacy interests

outweigh the public interest in compelled disclosure and that the documents are thus exempted under Exemption 7(C).

III. BIOPHYSICS IS NOT ENTITLED TO DISCLOSURE OF THE REQUESTED MATERIALS BECAUSE SUCH DISCLOSURE WOULD REVEAL THE IDENTITIES OF CONFIDENTIAL SOURCES WITHIN THE MEANING OF CLAUSE (D) OF EXEMPTION 7

It has long been recognized that effective law enforcement requires that the Government be able to encourage citizen cooperation by assuring that the identity of informers will remain confidential at least until the informer's testimony is required in court. As the Supreme Court stated in Roviaro v. U.S., 353 U.S. 53, 59 (1957):

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Case citations omitted]. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

While this pronouncement occurred in a criminal case, the principle has general application.[23] Machin v. Zuchert, 316 F. 2d 336, 339 (C.A.D.C.,

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23/ "In enforcing laws that make certain conduct unlawful such as the anti-trust laws, the Fair Labor Standards Act, and the civil rights laws, the courts have recognized that the government must retain the confidence of its sources of information. In these cases the courts have refused to require the disclosure of the names of informants on the basis of a qualified privilege." United States v. Northside Realty Associates, 324 F. Supp. 287, 295 (N.D. Ga., 1971).

1963); Hodgson v. Charles Martin, 459 F. 2d 303, 305 (C.A. 5, 1972). And, as shown above, the Board's procedures incorporate this privilege by preserving the confidentiality of informants and information furnished by them unless and until they are called as witnesses in an unfair labor practice proceeding. Moreover, as the Fifth Circuit recognized in Hodgson v. Charles Martin, supra, 459 F. 2d at 306, the informer's privilege extends beyond the identity of the source and includes the contents of the statements themselves:

> Knowing the identity of persons who give statements to the [Government] is not equivalent to knowledge of which of those persons were informers within the context of the privilege. Only when the content of a statement is disclosed will it be revealed whether the information was given reluctantly or voluntarily, whether the tone and manner in which it was given was friendly to the defendant or unfriendly, and whether it was accusatory or favorable. In short, if the employee is not known to the defendant as an informer but merely as a statement giver, then disclosure of the statement might reveal him as an informer.

While the original Exemption 7 did not specifically allude to the informer's privilege, its inclusion therein was implicit in view of the legislative purpose of that exemption. Evans v. Department of Transportation of United States, 446 F. 2d 821, 823-824 (C.A. 5, 1971). See also, Wellman Industries, Inc. v. N.L.R.B., supra; Rural Housing Alliance v. United States Department of Agriculture, supra, 498 F. 2d at 82; Clement Bros., Inc. v. N.L.R.B., 282 F. Supp. 540, 542 (N.D. Ga., 1968). In amending Exemption 7, Congress, explicitily approving this established case law, included clause (D) to protect the confidentiality traditionally

accorded Government sources of law enforcement information. Senator Hart, the amendment's sponsor, made clear that this clause was designed to protect "without exception and without limitation the identity of informers . . . [whether they] be paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential." 120 Cong. Rec. 17034 (1974). Thus, Congress specifically provided that nondisclosure of investigatory records is appropriate under the amended FOIA in order to protect both governmental and individual interests in confidentiality. 24/

24/ Cf. National Parks and Conservation Ass'n v. Morton, 498 F. 2d 765, 769 (C.A.D.C., 1974), identifying two purposes for protecting confidential commerical information in Exemption 4 of the FOIA as "(1) encouraging cooperation by those who are not obligated to provide information to the government and (2) protecting the rights of those who must."

As the Conference Report on the new amendments states (Report No. 93-1380, 93d Cong., 2d Sess. (1974) at p. 13):

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes--either civil or criminal in nature--the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information.

This explanation clearly indicates that Exemption 7(D) applies not only where an express assurance of confidentiality was given, but also where such an assurance can be reasonably inferred.

In light of this legislative history, Exemption 7(D) plainly exempts materials such as statements taken by Board agents investigating unfair labor practice charges. Thus, in order to preserve the confidentiality of its sources, it has long been the official policy of the Board and its General Counsel, whether in a discovery context or in litigation under the FOIA, to vigorously resist disclosure of affidavits until "after a witnesses. . . has testified in a hearing upon a complaint. . . ." 29 C.F.R. 102.118(b)(1). See Vapor Blast Mfg. Co. v. Madden, 280 F. 2d 205 (C.A. 7, 1960), cert. denied, 364 U.S.

910. [25/] Moreover, the Courts have long recognized the Board's need to "secure supporting statements from employees" and have also specifically approved its policy of protecting its investigative sources by "preserving the confidentiality of employee statements." Texas Industries, Inc.

25/ Section 10058.4 of the NLRB Case Handling Manual, Part I provides in pertinent part:

> As for the confidential nature of [a witness'] information, he should be told the truth—that the information would be used by us in ascertaining the total picture and that this would be its only use unless and until he might be called on to give his information in the form of testimony at a formal hearing or in the unlikely event another agency made a valid request upon us for such information.

Disclosure of any affidavits obtained in Board investigations would undermine the Board's policy of giving such assurances, thereby seriously diminishing the availability of information necessary for the effective enforcement of the Act. However, the argument for non-disclosure is even more compelling in the instant case inasmuch as the Board has shown, by affidavit, that the above policy was, in fact, followed and that, in at least one instance, a reluctant witness agreed to provide information only upon the express assurance that it would remain confidential, except in the circumstances set forth above. (A. 114a).

Nor does the qualified nature of the assurance preclude application of the exemption; all assurances of confidentiality given in either criminal or civil proceedings must be termed "qualified" in view of court decisions and statutes requiring disclosure where necessary to protect a defendant's right to due process. See Roviaro v. U.S., supra; Brennan v. Engineered Products, Inc., 506 F. 2d 299, 304 (C.A. 8, 1974); N.L.R.B. v. Adhesive Products Corp., 258 F. 2d 403, 408 (C.A. 2, 1958); Jencks Act, 18 U.S.C. Sec. 3500. Furthermore, it is statistically unlikely that any given affiant will be called to testify in Board proceedings; over 94 percent of all unfair labor practice cases closed during fiscal year 1975 were closed prior to hearing and many affiants who gave statements in the remaining 6 percent were never called to testify because their testimony would have been cumulative or irrelevant. N.L.R.B. Fortieth Annual Report (Fiscal Year 1975) at 225.

v. N.L.R.B., supra, 336 F. 2d at 134. See also, N.L.R.B. v. Wellman Industries, Inc., supra, 490 F. 2d at 431; N.L.R.B. v. National Survey Service, Inc., 361 F. 2d 199, 206 (C.A. 7, 1966); Suprenant Mfg. Co. v. N.L.R.B., 341 F. 2d 756, 763 (C.A. 6, 1965).

These cases recognize that the Board's investigatory function depends for its existence upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known. If the Board were required to disclose the identity of its sources under the FOIA, its ability to obtain information in the future, especially from employees, would be severely impaired. The Board must be permitted to maintain the confidentiality of its sources, and Exemption 7(D) plainly recognizes this necessity.

Disclosure of many of the materials requested could supply Biophysics with information leading to the identity of the Board's informants. Among these materials are the Region's complaint memoranda (e.g., Item 128), statements taken from individuals by Board investigators (e.g., Items 125, 144, 147, 159), notes and memoranda prepared for or summarizing interviews with investigative sources (e.g., Items 158, 138, 140), and intra-agency communications and other records that could help reveal their identity (e.g., Items 133, 158). These documents are clearly protected under Exemption 7(D) of the FOIA.

It is no answer to suggest, as Biophysics does, that the interests protected by Exemptions 7(C) and 7(D) would be adequately protected by deletion of portions of the documents requested. Mere deletion of affiants'

names from affidavits and memoranda would not sufficiently safeguard privacy or the identity of confidential sources. While the FOIA provides that "[a]ny reasonably segregable portion of a record" must be made available after deletion of exempt portions, 5 U.S.C. §552(b), deletion of all segments which might conceivably identify an affiant would leave nothing but disconnected gibberish. In Harvey's Wagon Wheel, Inc. v. N.L.R.B., F. Supp. , 91 LRRM 2410, 2415 (N.D. Cal., 1976), appeal pending (C.A. 9, No. 76-1355), the Court observed:

> The problems in undertaking to decide which portions of an employee's statement may be released to his employer without revealing that employee's identity are enormous, if, indeed, not insoluble. Merely deleting the name from the statement would not insure against identification since the employee's narrative, or part of it, may be such that the employer could identify the employee involved or could narrow the group down to two or three employees. Moreover, it is doubtful whether the court could select which portions to release with the degree of certainty required adequately to protect the interests of employees who wish to avoid identification.

A problem like that confronting the district court in Harvey's exists in the present case because the identity of individuals might readily be deduced from the particular incidents discussed in the affidavits and memoranda where the incidents were generally known to have been witnessed by only a few persons.

Finally, not only is deletion an inadequate safeguard for the interests protected by Exemption 7(C) and 7(D), but it is also unnecessary since, for the reasons set forth above (Section I) and below (Section IV), the affidavits and memoranda are exempt in their entirety

under Exemptions 7(A) and 5 of the FOIA. It is apparent that disclosure of even the general substance of such documents prior to an unfair labor practice proceeding would prematurely reveal information not otherwise available to litigants in such proceedings. Moreover, disclosure of any portion of the contents of the affidavits would substantially deter potential witnesses in future Board investigations. An individual who is reluctant to provide information because he fears reprisal is unlikely to cooperate if he knows that his identity will be protected only by deletions made by the Board or a court, which he realizes cannot be based on an intimate familiarity with his workplace. Similarly, the disclosure of any portions of the affidavits and memoranda would reveal the work product of Board attorneys protected by Exemption 5 and thus undermine the safeguards which the work product privilege extends to the adversary system. See infra, pp. 45-48. In sum, the deletion of portions of the documents at issue is inadequate to safeguard the interests protected by Exemption 7(C) and 7(D) of the FOIA.

IV. DOCUMENTS WHICH REVEAL THE AGENCY DELIBERATIVE PROCESS OR WHICH ARE PREPARED BY THE AGENCY IN ANTICIPATION OF LITIGATION IN THE UNFAIR LABOR PRACTICE PROCEEDING ARE PROTECTED FROM DISCLOSURE EXEMPTION 5 OF THE FOIA

A. Background

Exemption 5 of the FOIA, which was not changed by the recent amendments, exempts from disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other

than an agency in litigation with the agency." As the Supreme Court explained in N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 149, Exemption 5 exempts all documents "normally privileged in the civil discovery context." In determining whether the document in question would be discoverable, the Court noted that one would not take as an example "litigation in which the private party's claim is the most compelling" but rather would consider whether the document "would 'routinely be disclosed' in private litigation." Id. at 149 n. 16, citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (emphasis added). See also, Kent Corporation v. N.L.R.B., 530 F. 2d 612, 624 (C.A. 5, 1976).

Documents protected by a privilege, either absolute or qualified are, of course, not routinely discoverable. Two basic types of privilege incorporated in Exemption 5 are, as the Sears Court noted (421 U.S. at 149), the well established privilege for "confidential intra-agency advisory opinions," disclosure of which would be "injurious to the consultative functions of government," commonly known as "executive privilege" (quoting from Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl., 1955)) and the "attorney work product privilege generally available to all litigants." See also, Kent Corporation v. NLRB, supra, 530 F. 2d at 618.

In the present case, "executive privilege" applies to the minutes of Regional Office meetings, intra-agency memoranda regarding issuance of complaint and other similar memoranda because they are "predecisional" documents in which the General Counsel's litigating positions are being

worked out. Id. See Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184 (1975). The attorney work product privilege, first defined by the Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947), is the most relevant aspect of Exemption 5 for such documents as the Board agent's notes of witness interviews and witness statements at issue in this case.

B. The work product privilege

In holding that Exemption 5 incorporates the work product privilege, the Sears Court observed (421 U.S. at 154), that the 1965 Senate Report on the proposed FOIA explained that this exemption "would include the working papers of the agency attorney . . . ." S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965).

The policy underlying the attorney work product privilege was originally explained in Hickman v. Taylor,[26/] the landmark decision reaffirmed by the Court in N.L.R.B. v. Sears, Roebuck & Co., supra, 421 U.S. at 154:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is "the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is re-

26/ 329 U.S. 495 (1947).

> flected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed . . . the work product of the lawyer. (329 U.S. at 510--511).

In his now-classic statement, Justice Murphy described the undesireable consequences flowing from disclosure of an attorney's work product (Id. at 511):

> Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Virtually all of the documents for which Exemption 5 has been claimed in this case come within the work product privilege aspect of the exemption because they are documents prepared in anticipation of litigation, either by attorneys or those working with attorneys,[27/] and such documents are not "routinely" available in civil litigation.

Rule 26(b)(3) of the Federal Rules of Civil Procedure, which incorporates the work product privilege, provides in pertinent part (emphasis supplied):

> (3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only

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27/ It is now settled that the work product privilege protects the work of non-lawyer aides as well as that of attorneys. U.S. v. Nobles, 422 U.S. 225, 238-239 (1975); J.H. Rutter Rex Mfg. Co. v. N.L.R.B., 473 F. 2d 223, 234 (C.A. 5, 1973), cert. denied, 414 U.S. 822.

> upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. . . .

The Fourth Circuit, construing this rule in Duplan Corporation v. Moulinage et Retorderie de Chavanoz, 509 F. 2d 730, 733-735 (C.A. 4, 1974), cert. denied, 420 U.S. 997 (1975), has held that it incorporates a virtually absolute privilege for attorney work product consisting entirely of an attorney's "mental impressions, conclusions, opinions, or legal theories," and a qualified privilege — i.e., one which yields only upon a showing of "substantial need" and "undue hardship" -- for other materials prepared in anticipation of litigation. See also Harper & Row Publishers, Inc. v. Decker, 423 F. 2d 487, 492 (C.A. 7, 1970), aff'd by equally divided court, 400 U.S. 348 (1971). Thus, neither type of material can be fairly described as routinely available by law in civil litigation.

The materials to which Exemption 5 applies in the instant case include such documents as memoranda on the status of the case (e.g., Items 128, 130), memoranda to the file or to other staff members regarding particular pieces of relevant evidence (e.g., Items 143, 132), notes concerning arrangements to interview witnesses (e.g., Items 135, 138, 142), and memoranda regarding issuance of complaint (Item 128). In I.B.M. v. Edelstein, 526 F. 2d 37, 41 (C.A. 2, 1975), this Court re-

cently affirmed the view that the attorney work product applies to such statements: "A lawyer talks to witnesses to ascertain what, if any, information the witnesses may have relevant to his theory of the case, and to explore the witness' knowledge, memory and opinion -- frequently in light of information counsel may have developed from other sources. This is part of the attorney's so called work product." In addition, statements and notes taken in preparation for and as a result of interviews are privileged work product within Exemption 5. In Hickman v. Taylor, supra, the Supreme Court recognized a qualified privilege from disclosure under normal discovery procedures for memoranda and statements "collected by an adverse party's counsel in the course of preparation for possible litigation." Id., at 505.[28/] The Court stated (id. at 510):

> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal

28/ The Court acknowledged (id., at 511-513) that upon a showing of special need, written statements might be producible, and that in "a rare situation" an exception to the privilege might be made for documents such as memoranda. However, both Hickman and Rule 26(b)(3), F.R.C.P., which incorporates the Hickman holding, make it clear that such documents are not routinely available to a private party in litigation, whether with an agency or with another private party. See Duplan Corp. v. Moulinage et Retorderie de Chavanoz, supra. It is worth noting that the Company has not explained whether it made any independent efforts to obtain the information requested, nor has it explained why it would be unable to do so.

> claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

The fact that some of these documents might, at the appropriate time, be producible as Jencks Act statements does not deprive them of their status as work product.[29/] Even signed statements which were taken or solicited by Board agents and which would clearly have to be produced if the witnesses testified (See e.g., Items 125, 144, 159, 160, 162) fall within the Hickman rule. See N.L.R.B. v. Quest-Shon Mark Brassiere Co., 185 F. 2d 285, 289-290 (C.A. 2, 1950), cert. denied, 342 U.S. 812; Raser Tanning Co. v. N.L.R.B., 276 F. 2d 80, 82-83 (C.A. 6, 1960), cert. denied, 363 U.S. 830. Since these interview memoranda thus fall within the work product privilege, they also fall within Exemption 5 of the FOIA. N.L.R.B. v. Sears Roebuck and Co., supra, 421 U.S. at 154; Kent Corporation v. N.L.R.B., supra, 530 F. 2d at 618. See also, Hook Drugs, Inc. v. N.L.R.B., F. Supp. , 91 LRRM 2797, 2801 (S.D. Ind., 1976); Jamco International, Inc. v. N.L.R.B.,[30/] F.Supp. , 91 LRRM 2446, 2449 (N.D. Okla., 1976).

29/ In Goldberg v. United States, 44 U.S.L.W. 4424 (U.S., March 30, 1976), the Supreme Court recently held that the work product doctrine does not bar production of a prosecutor's witness interview notes pursuant to the Jencks Act if they are shown to have been adopted or approved by the witness. (Apparently in Goldberg no typed statements were prepared on the basis of the notes). The Goldberg Court did not, however, hold that such notes are not work product. Rather, it held that the definition of "statement" embodied in the Jencks Act was intended to include even work product notes, where they were adopted or approved by the witness. Thus Goldberg in no way undercuts the holding that work product is generally not property under the civil discovery rules.

30/ Regarding the relevance of the executive privilege aspect of Exemption 5 to witness statements assembled in an agency investigation, see Brockway v. Department of the Air Force, 518 F. 2d 1184 (C.A. 8, 1975).

If, as shown, witness statements and notes on witness interviews are within the work product privilege, and hence within Exemption 5, then notes and memoranda by attorneys and other Board agents which set out the questions used to elicit information on issues selected as significant in the case are, a fortiori, exempt on that basis. Indeed, it is difficult to conceive of circumstances in civil litigation in which an attorney would be compelled to turn over to opposing counsel lists of questions he asks witnesses in preparing his case. Thus, notes of Board attorneys or other Board agents asking questions related to issues in the litigation are within Exemption 5 (see,e.g., Items 135, 137, 138, 139, 155, 157, 161) as are lists of prospective witnesses (Item 126) prepared as an aid in gathering information, and rough handwritten notes and typed memoranda summarizing and analyzing results of interviews with Biophysics' employees (e.g., Items 124, 133, 136, 146, 149, 156).

C. The executive privilege

As the Supreme Court noted in Sears (421 U.S. at 149), Exemption 5 preserves in the FOIA context the "executive privilege" protecting pre-decisional communications, because "frank discussions of legal and policy matters in writing might be inhibited if the discussion were made public; and . . . the decisions and policies formulated would be poorer as a result." See also,Kent Corporation v. NLRB, supra. Insofar as several of the documents at issue reflect communications of attorneys' thoughts and analyses of the Region's investigation, they clearly come within the executive privilege as incorporated within Exemption 5. For example, one

of the documents reflects intra-agency discussion of legal and tactical analysis of the unfair labor practice case against Biophysics and of the views of Board attorneys regarding the strengths and weaknesses of the evidence gathered in its investigation (Item 122). Other documents include a report to the General Counsel reflecting the Region's reasoning and legal grounds for issuance of complaint, and intra-office memoranda between the Region's investigators relating their thoughts as to credibility or other relative advantages of the evidence so far revealed (e.g., Items 105, 128, 130, 133). If disclosed, these documents would reveal the opinions and intra-agency deliberations of the Board's Regional Office personnel and would clearly frustrate the "frank discussions of legal and policy matters" Congress sought to protect by Exemption 5 of the FOIA.

D. Even factual portions of documents for which Exemption 5 is claimed are exempt from disclosure

The Fifth Circuit in Kent Corporation v. N.L.R.B., supra, considering the application of the work product privilege to the evidence summaries in the Final Investigation Reports there at issue, observed (530 F. 2d at 624):

> In our view, even the factual matters in these reports (which might not be protected by executive privilege) are protected by the work-product privilege. Writing in contemplation of forthcoming unfair labor practice litigation, an attorney must be able not only to discuss doctrinal theories but also to "assemble information, [and] sift what he considers to be the relevant from the irrelevant facts" without feeling that he is working for his adversary at the same time. Hickman v. Taylor, 329 U.S. at 511, 67 S. Ct. at 393, 91 L. Ed. at 462. The feeling would be well justified if we allowed the FOIA to be used to force disclosure of materials.

See also, Montrose Chemical Corp. v. Train, 491 F. 2d 63, 67-71 (C.A.D.C., 1974). Similarly, in N.L.R.B. v. Sears, Roebuck & Co., supra, the Supreme Court did not remand the case to the lower courts for segregation of factual materials, even though some of the documents at issue which the Court held to be within Exemption 5 -- memoranda by members of the General Counsel's Washington, D.C. staff which explained why regional offices should issue complaints on particular unfair labor practice charges -- contained summaries of evidence separate from the formal legal analysis. In its brief to the Court, the Board, citing Montrose Chemical Corp. v. Train, supra, had pointed out that factual material selected for its relevance to lega issues likely to be litigated or in litigation was different from the kinds of scientific reports concerned in such cases as Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), or Soucie v. David, 448 F. 2d 1067 (C.A.D.C., 1971). Although the Court did not find that the issue required discussion, it evidently accepted the distinction, and accordingly held that memoranda recommending the issuance of complaints were exempt in their entirety.

CONCLUSION

For the foregoing reasons, we respectfully submit that the order of the district court should be affirmed.

JANET C. MCCAA,
Deputy Assistant General Counsel
for Special Litigation,

ERIC GRAY MOSKOWITZ,
Attorney,

National Labor Relations Board,
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Applicant-Appellee, v. BIOPHYSICS SYSTEMS, INC., Respondent-Appellant, and BIOPHYSICS SYSTEMS, INC., Respondent-Appellant, v. JOHN S. IRVING, General Counsel of the National Labor Relations Board, and WINIFRED D. MORIO, Regional Director of the National Labor Rhlations Board, Region 2, Additional Defendants-Appellees on the Counter-claims.	No. 76-6094

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the Board's printed brief, in the above-captioned case, have this day been served by first-class mail upon the following counsel at the address listed below:

Lois D. Thompson, Esq.
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York

Dated: Washington, D.C.
October 22, 1976

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD